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SHANTA HOLDINGS SDN BHD

v.

GOLDEN UNI-CONSORTIUM SDN BHD

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FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA FCJ
AUGUSTINE PAUL FCJ
ZULKEFLI MAKINUDIN FCJ
[CIVIL APPEAL NO: 02-23-2007 (S)]

C

24 JANUARY 2008

COMPANY LAW: *Shares - Issue of shares - Application for acquisition of shares of shareholder dissenting from scheme approved by majority - Relevant provisions to be applied - Notice to dissenting shareholder -*

D

Whether a condition precedent before application could be made - Validity of order made pursuant to application - Companies Act 1965, s. 180(1), (3)

E

The respondent was a company incorporated under the Companies Act 1965 ('Act') with the sole purpose of acquiring the whole of the paid-up ordinary shares in one Aumkar Plantations Sdn Bhd ('transferor company'). The appellant held 9.99% of the fully paid-up ordinary shares of the transferor company. Subsequently, one Heinz Fochem, on behalf of the

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respondent, made a conditional offer to acquire the whole of the fully paid-up ordinary shares of the transferor company. 90.01% of the shareholders voted to accept the offer, and a without prejudice offer to sell 9.99% of the shares held by the appellant was made to the respondent on 9 March 2005. The respondent,

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however, did not take up the offer. The sale and transfer of 90.01% shares of the transferor company to the respondent was completed on 30 May 2005. The respondent then served on the appellant a notice pursuant to s. 180(3) of the Act. Four days after issuing the notice, the respondent took out an originating

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summons in the High Court praying, *inter alia*, for a declaration that the respondent was entitled to acquire the appellant's shares of 9.99% in the transferor company. The High Court granted the order, and further ordered that the terms and conditions for the acquisition should be the same as the acquisition of the 90.01%

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shares of the transferor company by the respondent. On appeal, the Court of Appeal agreed with the High Court's findings and decision. Hence, the present appeal by the appellant, in which the

following three questions of law were posed to this court: (1) whether the provisions of s. 180(3) of the Act are fundamentally different from the provisions of s. 180(1) of the Act; (2) whether the dissenting shareholder has three months to issue the notice as prescribed in s. 180(3)(b) of the Act, and whether such notice is a condition precedent before the transferee company is entitled to make an application to the court in terms of s. 180(3) of the Act; and (3) having regard to the true meaning and/or legal effect of s. 180(3) of the Act, whether an action or legal proceeding filed in court in contravention of the conditions precedent prescribed in s. 180(3) of the Act renders such action or legal proceeding a nullity.

Held (allowing the appeal)
Per Arifin Zakaria FCJ delivering the judgment of the court:

(1) Section 180(3) of the Act covers the situation where the shares of the consenting majority, equivalent to nine-tenths in total value, had already been transferred to the transferee company. In that event, it becomes incumbent upon the transferee company to give notice of that fact to the dissenting shareholder within one month from the date of the said transfer. The words "that fact" refers to the transfer of nine-tenths of the shares in the transferor company. The said notice must be in Form 58. Upon issuance of the said notice the dissenting shareholder may, within three months, give notice to the transferee company requiring it to acquire the shares in the hands of the dissenting shareholders. In the present case, no notice was ever issued by the appellant under s. 180(3)(b) of the Act. The appellant's letter dated 9 March 2005 could not constitute such a notice for the simple reason that it preceded the Form 58 Notice. Thus, in the circumstances, it was erroneous for the Court of Appeal to hold that the letter dated 9 March 2005, which was written on a without prejudice basis, was a valid notice requiring the respondent to acquire the appellant's shares. Therefore, Questions (1) and (2) would be answered in the following manner. Firstly, on the facts of the instant case, s. 180(1) of the Act had no application and the relevant provision to be applied was s. 180(3) of the Act. Applying the said section, upon the receipt of the notice in Form 58, the appellant had the right to decide whether or not to issue a notice under s. 180(3)(b) of the Act to require the respondent to acquire

its shares in the transferor company. It could exercise this right within the period of three months from the date of the Form 58 Notice. The respondent had no such right. (paras 12, 21 & 24)

(2) The next question was whether the requirement of the notice under s. 180(3)(b) of the Act is a condition precedent to be satisfied before the transferee company is entitled to make an application to the court in terms of s. 180(3) of the Act. This formed the second part of Question (2). Under s. 180(3) of the Act, once a shareholder has given a notice under para. (b) of the said section, the transferee company shall be entitled and bound to acquire its shares. Under the said section, it was clear that the application to the court can be made by either the transferee company or the dissenting shareholder. But the application only arises when the parties could not reach an agreement on the terms of the acquisition of the shares by the transferee company. This agreement, however, could only arise following the giving of a notice under s. 180(3)(b) of the Act. Without such a notice having been given, no dispute arose and hence the issue of an application to court for determination of the price did not arise. That answered the second part of Question (2). (paras 25 & 26)

(3) In respect of Question (3), in the circumstances of this case, no application could properly have been made to the court under s. 180(3) of the Act. It followed that whatever order was made by the court pursuant to the said application was null and of no effect, and may be set aside *ex debito justitiae*. Thus, the answer to Question (3) was in the affirmative. (para 27)

Bahasa Malaysia *Translation Of Headnotes*

Responden adalah sebuah syarikat yang diperbadankan di bawah Akta Syarikat 1965 ('Akta') dan tujuan tunggalnya adalah untuk mengambil-alih saham-saham berbayar biasa dalam syarikat Aumkar Plantations Sdn Bhd ('syarikat pemindah'). Perayu memegang 9.99% saham-saham berbayar biasa dalam syarikat pemindah. Berikutnya, satu Heinz Fochem, membuat tawaran bersyarat bagi pihak responden untuk mengambil-alih semua saham-saham berbayar biasa syarikat pemindah. 90.01% dari pemegang-pemegang saham mengundi untuk menerima tawaran, dan satu tawaran tanpa prejudis untuk menjual 9.99% saham yang dipegang oleh perayu

telah juga dibuat kepada responden pada 9 Mac 2005. Responden, bagaimanapun, tidak menerima tawaran tersebut. Penjualan dan pemindahan 90.01% saham-saham syarikat pemindah kepada responden telah disempurnakan pada 30 Mei 2005. Responden kemudian menyerahkan notis di bawah s. 180(3) Akta kepada perayu. Empat hari selepas menyerahkan notis, responden memfail saman pemula di Mahkamah Tinggi memohon, antara lain, deklarasi bahawa ia berhak untuk mengambil-alih 9.99% saham-saham perayu di dalam syarikat pemindah. Mahkamah Tinggi membenarkan perintah dan memerintahkan selanjutnya bahawa terma dan syarat pengambil-alihan hendaklah sama seperti pengambil-alihan 90.01% saham-saham syarikat pemindah oleh responden. Di rayuan, Mahkamah Rayuan bersetuju dengan dapatan dan keputusan Mahkamah Tinggi. Perayu dengan itu merayu sekaligus membangkitkan tiga persoalan undang-undang berikut ke mahkamah ini: (1) sama ada peruntukan s. 180(3) Akta berbeza dengan secara fundamental dari peruntukan s. 180(1) Akta; (2) sama ada pemegang saham yang menentang mempunyai masa tiga bulan untuk mengeluarkan notis seperti yang ditetapkan oleh s. 180(3)(b) Akta, dan sama ada notis tersebut merupakan satu syarat duluan sebelum syarikat penerima pindahan berhak untuk membuat permohonan ke mahkamah selaras dengan terma s. 180(3) Akta; dan (3), sama ada suatu tindakan atau prosiding undang-undang yang difailkan di mahkamah yang melanggar syarat-syarat duluan di s. 180(3) Akta adalah tidak sah, mengambilkira maksud sebenar dan/atau kesan undang-undang s. 180(3) Akta.

Diputuskan (membenarkan rayuan)
Oleh Arifin Zakaria HMP menyampaikan penghakiman mahkamah:

(1) Seksyen 180(3) Akta merangkumi situasi di mana saham-saham pihak majoriti yang bersetuju, yang bersamaan dengan sembilan persepuluh dari nilai keseluruhan, telah pun dipindahkan kepada syarikat penerima pindahan. Dalam keadaan sedemikian, ianya menjadi tanggungjawab syarikat penerima pindahan untuk memberi notis fakta tersebut kepada pemegang saham yang menentang dalam tempoh sebulan dari tarikh pemindahan. Perkataan "fakta tersebut" merujuk kepada pemindahan sembilan persepuluh saham-saham di dalam syarikat pemindah. Notis itu pula hendaklah di dalam Borang 58. Sebaik notis dikeluarkan, pemegang saham yang menentang bolehlah, dalam tempoh tiga bulan, memberi notis kepada syarikat penerima pindahan memintanya mengambil-alih saham-

saham yang ada di tangan pemegang-pemegang saham yang menentang. Dalam kes semasa, tiada apa-apa notis dikeluarkan oleh perayu di bawah s. 180(3)(b) Akta. Surat perayu bertarikh 9 Mac 2005 bukan suatu notis atas alasan mudah bahawa ia mendahului Notis Borang 58. Oleh yang demikian, adalah silap bagi Mahkamah Rayuan untuk memutuskan bahawa surat bertarikh 9 Mac 2005, yang ditulis atas dasar tanpa prejudis, adalah suatu notis sah yang mengkehendaki responden mengambil-alih saham-saham perayu. Oleh itu, Soalan-soalan (1) dan (2) akan dijawab seperti berikut. Pertama, berdasarkan fakta-fakta kes semasa, s. 180(1) Akta tidak terpakai dan peruntukan relevan yang terpakai adalah s. 180(3) Akta. Dengan menggunapakai seksyen ini, sebaik Notis Borang 58 diterima, perayu berhak untuk memutuskan sama ada atau tidak untuk mengeluarkan notis di bawah s. 180(3)(b) Akta supaya responden mengambil-alih saham-sahamnya di dalam syarikat pemindah. Perayu boleh melaksanakan haknya itu dalam tempoh tiga bulan dari tarikh Notis Borang 58. Apapun, hak ini tidak dimiliki oleh responden.

(2) Persoalan berikutnya adalah sama ada kehendak notis di bawah s. 180(3)(b) Akta adalah satu syarat duluan yang perlu dipatuhi sebelum syarikat penerima pindahan boleh membuat permohonan ke mahkamah mengikut terma s. 180(3) Akta. Ini adalah bahagian kedua kepada Soalan (2). Di bawah s. 180(3) Akta, sebaik sahaja seorang pemegang saham memberikan notis di bawah perenggan (b) seksyen tersebut, syarikat penerima pindahan akan berhak dan terikat untuk mengambil-alih saham-sahamnya. Di bawah seksyen tersebut, jelas bahawa permohonan ke mahkamah boleh dibuat sama ada oleh syarikat penerima pindahan ataupun pemegang saham yang menentang. Tetapi permohonan hanya berbangkit bilamana pihak-pihak tidak dapat mencapai kata sepakat mengenai terma-terma pengambil-alihan saham oleh syarikat penerima pindahan. Kata sepakat ini, bagaimanapun, hanya boleh berbangkit setelah notis di bawah s. 180(3)(b) Akta diberi. Tanpa pemberian notis tersebut, tiada pertikaian boleh berbangkit dan kerana itu isu permohonan ke mahkamah dan penentuan harga tidak berbangkit. Ini sekaligus menjawab bahagian kedua Soalan (2).

(3) Berhubung Soalan (3), dalam halkeadaan kes ini, tiada permohonan ke mahkamah di bawah s. 183(3) Akta boleh dibuat dengan teraturnya. Ianya mengikut bahawa apa jua perintah yang dibuat oleh mahkamah ekoran permohonan sedemikian adalah terbatal dan tidak berkesan, dan boleh diketepikan *ex debito justitiae*. Oleh itu, jawapan kepada Soalan (3) adalah berbentuk afirmatif.

Case(s) referred to:

Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd [1920] 28 CLR 129 ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Majlis Peguam Malaysia & Ors v. Joseph Au Kong Weng [1993] 2 CLJ 417 SC ***(refd)***

Re Western Manufacturing (Reading) Ltd [1956] 1 Ch 436 ***(refd)***

Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 5 CLJ 673 FC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 180(1), (3)(a), (b)

Companies Act 1948 [UK], s. 209(2)

Other source(s) referred to:

Weinberg and Blank, *Take-Overs and Mergers*, 4th edn, para 1403, p 334

For the appellant - Ronny Cham (Rosslin Peter Rosen with him); M/s Ting, Rosen & Co

For the respondent - Jeyan TM Marimuttu; M/s J Marimuttu & Partners

[Appeal from Court of Appeal, Civil Appeal No: S-02-868-2005]

Reported by Suresh Nathan

JUDGMENT

Arifin Zakaria FCJ:

Background

[1] This is an appeal against the decision of the Court of Appeal dismissing the appeal by the appellant against the decision of the High Court Sabah and Sarawak at Tawau. The following three questions of law based on the Companies Act 1965 ("the Act") were posed to this court:

A (1) Are the provisions of Section 180(3) of the Act fundamentally different from the provisions of Section 180 (1) of the Act?

(2) Whether the dissenting shareholder has 3 months to issue the notice as prescribed in Section 180(3)(b) and whether B such notice is a condition precedent before the transferee company is entitled to make application to the court in terms of Section 180(3) of the Act?

(3) Having regard to the true meaning and/or legal effect of Section 180(3) of the Act, is an action or legal proceedings, C filed in Court in contravention of the conditions precedent prescribed in Section 180(3) of the Act render such action or legal proceedings a nullity?

[2] The memorandum of appeal is at pp. 7-10 of the appeal D record.

The Facts

[3] Prior to going into the issues raised before us it is first necessary to set out the facts relevant to the consideration of E these issues. They were not in dispute, and briefly are as follows:

[4] The respondent is a company incorporated on 14 February 2005 under the Act. It was incorporated with the sole purpose of acquiring the whole of the paid up ordinary shares in Aumkar F Plantations Sdn. Bhd. ("the transferor company"). The transferor company has an authorized share capital of RM50,000,000 divided into 50,000,000 ordinary shares of RM1 each, of which 30,500,000 shares have been issued and fully paid up. A total of 3,046,485 of those shares were held by the appellant, constituting G 9.99% of the fully paid up ordinary shares of the transferor company.

[5] On 10 January 2005, one Heinz Fochem, on behalf of the respondent, made a conditional offer to acquire the whole of the fully paid up ordinary shares of the transferor company. H

[6] At the Extra Ordinary General meeting of the transferor company, held on 21 February 2005, 90.01% of the shareholders voted to accept the offer. A without prejudice offer to sell 9.99% of the shares held by the appellant was made to the respondent I on 9 March 2005 but this was not taken up by the respondent.

[7] The sale and transfer of 90.01% shares of the transferor company to the respondent was completed on 30 June 2005. Subsequently, the respondent through its solicitors by a letter dated 30 June 2005, served on the appellant a notice pursuant to s. 180(3) of the Act.

[8] On 4 July 2005, ie, four days after issuing the said notice, the respondent took out an originating summons in the High Court at Tawau praying, *inter alia*, for a declaration that the respondent is entitle to acquire the appellant's shares of 9.99% in the transferor company. An order in terms of the said prayer was granted by the High Court. The High Court further ordered that the terms and conditions for the acquisition shall be the same as the acquisition of 90.01% shares of the transferor company by the respondent.

[9] On appeal the Court of Appeal agreed with the findings and decision of the High Court and hence this appeal.

The Questions Before Us

Questions (1) and (2)

[10] We propose to deal with questions (1) and (2) together as they are interrelated. They turn on the interpretation of subsections (1) and (3) of s. 180 of the Act which for convenience are reproduced below:

> Power to acquire shares of shareholders dissenting from scheme or contract approved by majority.
>
> 180. (1) Where a scheme or contract involving the transfer of all of the shares or all of the shares in any particular class in a company (in this section referred to as the "transferor company) to another company or corporation (in this section referred to as the "transferee company") has within four months after the making of the offer in that behalf by the transferee company been approved as to the shares or as to each class of shares whose transfer is involved by the holders of not less than nine-tenths in nominal value of those shares or of the shares of that class (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may at any time within two months after the offer has been so approved give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares and when such a notice is given the transferee company shall,

A unless on an application made by the dissenting shareholder within one month from the date on which the notice was given or within seven days of a statement being supplied to a dissenting shareholder pursuant to subsection (2) (whichever is the later) the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms which, under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company or if the offer contained two or more alternative sets of terms upon the terms which were specified in the offer as being applicable to dissenting shareholders.

(2) … (not relevant)

(3) Where in pursuance of any such scheme or contract, shares in a company are transferred to another company or its nominee and those shares together with any other shares in the first mentioned company held by, or by a nominee for, the transferee company or its subsidiary at the date of the transfer comprise or include nine-tenths in nominal value of the shares in the first-mentioned company or of any class of those shares, then:

(a) the transferee company shall within one month from the date of the transfer (unless on a previous transfer in pursuance of the scheme or contract it has already complied with this requirement) give notice of that fact in the prescribed manner to the holders of the remaining shares or of the remaining shares of that class who have not assented to the scheme or contract; and

(b) any such holder may within three months from the giving of the notice to him require the transferee company to acquire the shares in question,

and where shareholder gives notice under paragraph (b) with respect to any shares, the transferee company shall be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it, or on such other terms as are agreed or as the Court on the application of either the transferee company or the shareholder thinks fit to order.

[11] It would appear that under the scheme of the Act, s. 180(1) of the Act covers the situation where nine-tenths of the shareholders of the transferor company have approved and accepted the offer by the transferee company. Subsequent thereto, the transferee company may, at any time within two

months after the offer has been so approved, give notice to the dissenting shareholders of their desire to acquire his share. And within one month of such notice the dissenting shareholder may apply to court to resist such acquisition. If no application is made to the court by the dissenting shareholder, the transferee company shall be entitled and bound to acquire the dissenting shareholder's shares on the same terms and conditions as the approving shareholders. In this case no such notice was ever given by the transferee company under s. 180(1) of the Act. Therefore, the said section would not apply.

[12] In contrast s. 180(3) of the Act covers the situation where the shares of the consenting majority, equivalent to nine-tenths in total value, had already been transferred to the transferee company. In that event it becomes incumbent upon the transferee company to give notice of that fact to the dissenting shareholder within one month from the date of the said transfer. The words "that fact" here refers to the transfer of nine-tenths of the shares in the transferor company. The said notice must be in Form 58. Upon issuance of the said notice the dissenting shareholder may, within three months, give notice to the transferee company requiring it to acquire the entire shares in the hands of the dissenting shareholders. The purpose behind the said provision is explained in Weinberg and Blank on *Take-Overs and Mergers*, 4th edn at para. 1403 p. 334:

> In view of the fact that the position of a small minority in a subsidiary company may be "anything but satisfactory," the Cohen Committee felt that minority shareholders locked in as a result of a scheme or contract in terms of which the offeror company had acquired 90 per cent or more of the shares or shares of a class should have a corresponding right to compel the offeror company to acquire their shares. This recommendation is embodied in what is now section 209 (2).

[13] The section referred to here is s. 209(2) of the English Companies Act 1948, which is the equivalent of our s. 180(3) of the Act. Therefore, under s. 180(3) of the Act the appellant as the dissenting shareholder is given a period of three months to consider whether to exercise its right under the said section to require the transferee company to acquire its shares in the transferor company or not. This is stated in clear terms in the Form 58 Notice itself, the relevant part of which reads as follows:

A In pursuance of those provisions you may, within three months from the giving of this notice, give notice that you require the transferee company to acquire your holding of *... shares in the transferor company, and if you give that notice the transferee company will be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it, or on such other terms as are agreed or as the High Court on application made to it by you or by the transferee company thinks fit to order.

C **[14]** Thus, under s. 180(3) of the Act the dissenting shareholder may require the transferee company to acquire its shares in the transferor company.

[15] Once the dissenting/non assenting shareholder gives notice under the said section, the transferee company shall be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it. Therefore, in this regard, we agree with the submission of learned counsel for the appellant that the transferee company has no right to acquire the shares of the dissenting shareholders of the transferor company unless and until notice is given by the dissenting shareholder under para. (b) of s. 180(3) of the Act.

[16] Before us learned counsel for the respondents, En. Jeyan Marimuttu, contended that such a notice had been given. But when we asked him to produce the said notice he was unable to do so except to point to a letter dated 9 March 2005 from the appellant's solicitor to the transferor company wherein the appellant company made an offer to the respondent for the sale of their shares at RM5.50 per share. He contended that the said letter indicates that the appellant was always willing to sell its shares to the respondent. Likewise he said that the respondent was always willing to purchase the said shares. The only disagreement was over the price.

[17] The Court of Appeal agreed with the submission of the respondent as is apparent from the following passage from the judgment of the Court of Appeal which reads as follows:

In short, the respondent here was ready and willing to acquire the appellant's shares. On the part of the appellant, the appellant was also prepared to part with its shares except at a higher price, which of course will be settled by the Court when there is a disagreement over it. This willingness of the appellant for the respondent to acquire its shares is reflected in the appellant's solicitors' letter to the transferor company on 9.3.2005 where it asked for RM5.50 per share. This was subsequently reaffirmed by the appellant when the appellant gave a counter notice to the respondent to acquire its shares. Though this was given without prejudice to this appeal and subsequent to the application of the respondent but before the expiry of the 3-month period mentioned in s. 180(b) Companies Act, the fact remains that the appellant was desirous of the respondent to acquire its shares. These, in my opinion, clearly imply that the appellant had from the very beginning to the end of the 3-month period after the notice by the respondent under section 180(3)(a) of the Companies Act, intended and had notified the respondent to acquire its minority shares in the transferor company. The technical objection now raised by the appellant that the respondent should have delayed in filing its application is, to my mind, an attempt to extract from the respondent the price insisted on by the appellant for its shares.

[18] Thus, it would appear that both in the High Court and the Court of Appeal the requirement of a notice under para. (b) of s. 180(3) of the Act was never considered. It was brushed aside as being irrelevant. The Court of Appeal was of the view that the offer made by the appellant through its solicitor's letter of 9 March 2005 and subsequently reaffirmed by the appellant when the appellant gave a counter notice to the respondent to acquire its shares was sufficient notice for the purpose of para. (b) of s. 180(3) of the Act.

[19] Learned counsel for the appellant contended before us that the provisions of s. 180(3) of the Act have to be strictly complied with before the majority shareholder can exercise its right under the section. We are of the view that the words of s. 180(3) of the Act are plain.

[20] In our opinion the meaning to be ascribed to the provisions of s. 180(3)(b) of the Act is that upon the giving of the notice by the transferee company under s. 180(3)(a) of the Act the dissenting shareholder may within three months from that date give notice to the transferee company to require it to acquire its shares in the transferor company. The right to give notice under

A s. 180(3)(b) of the Act is expressly conferred upon the dissenting shareholder and not on the transferee company. This is fortified by the use of the words "such holder" in s. 180(3)(b) of the Act which is clearly a reference to the dissenting shareholder. Where such notice is issued by the dissenting shareholder, within the
B prescribed time, then and only then, the transferee company will be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it. It cannot be gainsaid that s. 180(3) of the Act creates rights and obligations on both parties
C thereby requiring a strict interpretation. As was held by the Supreme Court in *Majlis Peguam Malaysia & Ors v. Joseph Au Kong Weng* [1993] 2 CLJ 417, on general principle, where a statute regulates the exercise of a right or power or the use of a prescribed procedure, with express reference to time being made,
D there is a marked inclination of the court to regard the relevant provision as one which must be strictly and meticulously followed. We are duty bound to give effect to the meaning of the section. In this regard reference may be made to the observation of Higgins J in *Amalgamated Society of Engineers v. Adelaide Steamship*
E *Co. Ltd.* [1920] 28 CLR 129 at p. 161-162, cited with approval by this Court in *Sri Bangunan Sdn. Bhd. v. Majlis Perbandaran Pulau Pinang & Anor* [2007] 5 CLJ 673:

> The fundamental rule of interpretation, to which all others are
F subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning even if we think the result to
G be inconvenient, impolite or improbable.

[21] In the present case, we find that no notice was ever issued by the appellant under s. 180(3)(b) of the Act. The letter from the appellant's solicitors dated 9 March 2005 cannot constitute
H such a notice for the simple reason that it preceded the Form 58 Notice. Thus, in the circumstances, we agree with the appellant's submission that it is erroneous for the Court of Appeal to hold that the letter of 9 March 2005, which was written on a without prejudice basis, is a valid notice requiring the respondent to acquire
I the appellant's shares.

[22] On the question of the sufficiency of the notice, the Court of Appeal in its judgment cited the observation of Wynn-Parry J in *Re Western Manufacturing (Reading) Ltd.* [1956] 1 Ch. 436 in support of its conclusion. This is what it said:

> ... in deciding that the notice to the applicant was valid and dismissing the summons: that, in section 209(1), the phrase "within four months after the making of the offer" did not denote a fixed period during the whole of which the offer must remain open, but described a maximum period during which the event contemplated might occur; and that it was competent to A. Ltd. to fix a period within, but shorter than, the four months, during which the offer must be accepted.

[23] But that is not the issue here. The question here is whether the appellant had at any time issued a notice under s. 180(3)(b) of the Act. We found no such notice had ever been issued. Hence the question of the sufficiency or otherwise of the notice does not arise.

[24] We would therefore answer questions one and two in the following manner. Firstly we would say that on the facts of the instant case s. 180(1) of the Act has no application and the relevant provision to be applied is s. 180(3) of the Act. Applying the said section to the fact of this case we conclude that upon the receipt of the notice in Form 58 the appellant has the right to decide whether or not to issue a notice under s. 180(3)(b) of the Act to require the respondent to acquire its shares in the transferor company. It can exercise this right within the period of three months from the date of the Form 58 Notice. The respondent has no such right.

[25] The next question is whether the requirement of the notice under s. 180(3)(b) of the Act is a condition precedent to be satisfied before the transferee company is entitled to make an application to the court in terms of s. 180(3) of the Act. This forms the second part of question no. (2). Under s. 180(3) of the Act, once a shareholder has given a notice under para. (b) of the said section the transferee company shall be entitled and bound to acquire its shares. The terms of the acquisition will be:

(a) similar to that on which under the scheme or contract the shares of the approving shareholders were transferred to it;

(b) as are agreed between the parties; or

(c) as the Court thinks fit to order.

[26] Under the said section it is clear that the application to the court can be made by either the transferee company or the dissenting shareholder. But the application to the court only arises when the parties could not reach an agreement on the terms of the acquisition of the shares by the transferee company. This disagreement, however, could only arise following the giving of a notice under s. 180(3)(b) of the Act. Without such a notice having been given there cannot arise any dispute and hence the issue of an application to court for determination of the price does not arise. That answers the second part of question no. (2).

Third Question

[27] The third and final question is the effect of an application filed in court in contravention of s. 180(3) of the Act and the order made pursuant thereto. In the circumstances of this case we hold that no application could properly have been made to the court under s. 180(3) of the Act. It follows that whatever order was made by the court pursuant to the said application is null and void and is of no effect and force, and may be set aside *ex debito justitiae.* (See *Badiaddin Mohd. Mahidin & Anor v. Arab Malaysian Finance Bhd.* [1998] 2 CLJ 75). For the above reasons our answer to the third question is in the affirmative.

Conclusion

[28] In the premises we allow this appeal with costs both here and in the courts below. The order of the High Court is accordingly set aside.